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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-413

LOUIS J. POMPONIO, JR., *Petitioner*

v.

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

LOUIS J. POMPONIO, JR.
1117 North 19th Street
Arlington, Virginia 22209
Pro Se

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Petitioner prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered on June 3, 1975, Petition for Re-hearing was denied on August 15, 1975.

CITATION TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is unreported and is attached to this Petition (Petitioner's Appendix 1a-6a). The Order denying the petition for re-hearing and Re-hearing En Banc is attached (Petitioner's Appendix 6a-7a).

JURISDICTION

The Judgment of the United States Court of Appeals for the Fourth Circuit was entered on June 3, 1975 and Petition for Rehearing was denied on August 15, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

I. SHOULD NOT THIS COURT GRANT CERTIORARI AND REMAND THIS CAUSE TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT WITH DIRECTIONS TO CONSIDER THE PETITIONER'S ARGUMENT THAT THE EVIDENCE ON THE FIRST THREE COUNTS OF THE INDICTMENT WAS AT SUCH VARIANCE WITH THE CHARGES THAT AS A MATTER OF LAW A JUDGMENT OF ACQUITTAL IS REQUIRED AND THE EVIDENCE AS TO COUNT IV WAS INSUFFICIENT AS A MATTER OF LAW; AND DOES NOT A FAILURE OF THE COURT OF APPEALS TO DECIDE THESE ISSUES SUBJECT THE PETITIONER TO A RETRIAL IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS AGAINST DOUBLE JEOPARDY?

II. IS IT NOT A DENIAL OF DUE PROCESS BY FAILING TO INSURE A FAIR AND IMPARTIAL TRIAL WHEN THE UNITED STATES COURT OF APPEALS FAILED TO CONSIDER PETITIONER'S ARGUMENT THAT THE PREJUDICIAL REMARKS AND CONDUCT OF THE TRIAL JUDGE DENIED PETITIONER A FAIR AND IMPARTIAL TRIAL WHEN AT THE SAME TIME THE COURT REVERSED ON OTHER GROUNDS AND REMANDED FOR A NEW TRIAL TO THE SAME TRIAL JUDGE?

STATUTES AND RULES INVOLVED

Rule 29. Motion for Judgment of Acquittal.

(a) Motion Before Submission to Jury. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant

or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.

Fifth Amendment to the Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

28 § 2106. Determination.

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances, June 25, 1948, c. 646, 62 Stat. 963.

18 § 2314. Transportation of Stolen Goods, Securities, Moneys, Fraudulent State Tax Stamps, or Articles Used in Counterfeiting.

Whoever transports in interstate or foreign commerce any goods, wares, merchandise, secur-

> ities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or
>
> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person to travel in, or to be transported in interstate commerce in the execution or concealment of a scheme or artifice to defraud that person of money or property having a value of $5,000 or more; or * * *

STATEMENT OF THE CASE

The Petitioner, Louis J. Pomponio, Jr., was indicted on a 14-count indictment with three other codefendents, Paul Pomponio, Peter Pomponio and Charles J. Piluso (Petitioner's Appendix 7a-21a).

Prior to commencement of the trial, the Government elected to proceed to trial on only 10 of the original 14 counts. At the conclusion of the prosecution's case, the Court merged into one count the first five counts, charging mail fraud, and likewise merged into one count, counts eight and nine, charging wire fraud.

The trial continued on a five count indictment. Counts in the original indictment were dropped and renumbered.

Count I of the indictment charged a general scheme to defraud, named the Petitioner and the other codefendants as general participants in an overall scheme to defraud with the implementation of the mails in furtherance of the scheme. This Count, which involved all of the defendants, accounted for ninety percent of the evidence offered at the trial.

Count II of the indictment charged the Petitioner and the other three defendants with violating Title 18. Section 2314, of the United States Code by causing one Albert Ginsberg to travel in interstate commerce in furtherance of the scheme to defraud which was outlined in Count I and which was incorporated by reference in Count II.

The third Count of the indictment also incorporated the scheme to defraud alleged in Count I and charged a violation of Title 18. Section 1343, asserting that Petitioner and codefendants used the phone in furtherance of the scheme to defraud.

Count IV of the indictment (old Count 11 of the Appendix) charged the Petitioner and the other three defendants with interstate transportation of a security, a two million dollar check, obtained by fraud in violation of Title 18, Section 2314 of the United States Code.

The Petitioner and codefendant Charles J. Piluso were convicted on all four counts. The codefendants Paul Pomponio and Peter Pomponio were convicted on Count IV.

Count V of the indictment was held to be insufficient on its face and was dismissed "without prejudice to the Government to reindict and retry if it chooses" by the United States Court of Appeals for the Fourth Circuit.

The Petitioner Louis J. Pomponio, Jr., moved pursuant to Rule 29 of the Federal Rules of Criminal Procedure for a judgment of Acquittal re-argued on appeal the improprieties of the conduct and remarks of the trial judge, the material and prejudicial variance

of the evidence from the Indictment, the insufficiency of the evidence, and the failure of the trial judge to properly instruct the jury.

The United States Court of Appeals for the Fourth Circuit reversed the conviction of all the defendants for the failure of the trial judge to make requested inquiries of the jury concerning prejudicial newspaper articles that appeared during the course of the trial and the Court of Appeals expressly declined to consider the Petitioner's appeal to that Court that the evidence as offered constituted a fatal variance from the charges of the indictment as drawn, failed to consider the insufficiency of the evidence, and failed to consider the conduct and remarks of the trial judge that denied the Petitioner a fair and impartial trial.

Petition for Rehearing was timely filed and denied on August 15, 1975. This Petition follows.

REASONS WHY THE WRIT SHOULD BE GRANTED

I. THE REFUSAL OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT TO REVIEW THE EVIDENCE ON THE FIRST THREE COUNTS OF THE INDICTMENT AS BEING AT VARIANCE WITH THE CHARGES AND THE FAILURE TO REVIEW THE SUFFICIENCY OF THE EVIDENCE AS TO COUNT IV OF THE INDICTMENT, SUBJECTS THE PETITIONER TO A RETRIAL OF ALL FOUR COUNTS IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS AGAINST DOUBLE JEOPARDY AND FAILS TO FULFILL THE STATUTORY DUTY IMPOSED ON THE COURT OF APPEALS UNDER TITLE 28, SECTION 2106 OF THE UNITED STATES CODE.

The Petitioner moved for a judgment of acquittal at the close of the Government's case, and after he rested his own case in the trial court. The Petitioner

raised in the United States Court of Appeals for the Fourth Circuit as his main point of appeal the material variance of the evidence from Counts I, II, and III of the indictment and the insufficiency of the evidence as to Count IV of the indictment.

The United States Court of Appeals for the Fourth Circuit awarded the Petitioner and the codefendants a new trial and stated (Pet. App. 2a):

> "The Defendants raised numerous issues including newspaper publicity during the trial prejudicing the jury, and insufficiency of the indictment on Count V. Since we reverse and remand for a new trial on the basis of the failure of the District Court to inquire of the jury concerning prejudicial publicity during the trial which may have reached them, we reach none of the multitude of other issues raised except the sufficiency of Count V of the indictiment."

Among the "multitude of other issues" was the signal and main issue of the Petitioner Louis J. Pomponio, Jr. that the evidence was at variance with the indictment and as such a new trial on the indictment when compared with the evidence is erroneous. This objection would not be cured with a new trial. A new trial would take place on the same indictment and presumably the same evidence and the same basic objection would still exist.

The Government's case was based on evidence directed toward separate and unrelated schemes to defraud; it did not prove the alleged in the indictment.

Each scheme may have had a similar goal, that of raising funds for the Pomponio business, the goals were not common and the parties to each transaction were different.

Neither Congress nor the Supreme Court ever "intended to authorize the Government to string together, for common trial, * * * separate and distinct crimes, conspiracies related in kind though they might be, when the only nexus among them lies in the fact that (two men) participated in all." *Kotteakos* v. *United States,* 328 U.S. 750, 773 (1946). The existence of multiple schemes with multiple defendants requires that the trial court carefully instrust the jury on the treatment of multiple schemes. *Kotteakos* v. *United States, supra; United States* v. *Varelli,* 407 F.2d 735 (7th Cir. 1969).

The first three counts of the indictment involved the same common scheme, and the Trial Court instructed the jury on a "common plan or arrangement" (Tr. 2801-2802). Yet the evidence was directed to a series of separate schemes involving at least six parties, not all of whom were common to each scheme. Failure to instruct on multiple conspiracies has been held to be error where there was a common nucleus of conspirators and separate co-conspirators involved in each separate conspiracy. *United States* v. *Varelli,* 407 F.2d at 746-747; *Kotteakos* v. *United States, supra.*

In *United States* v. *Goss,* 329 F.2d 180 (4th Cir. 1964), where there were multiple conspiracies without a common interest or common confederate, this Court recognized the peril to defendants in the charge to the jury when the evidence reveals more than one conspiracy in a single count indictment. *Id.* at 184.

In this case, as in *Kotteakos, Goss* and *Varelli,* "no two of (the) agreements were tied together as stages in the formation of a larger all-inclusive combination, all directed to achieving a single unlawful end or re-

sult. On the contrary, each separate agreement had its own distinct, illegal end. Each loan was an end in itself, separate from all others, although all were alike in having similar illegal objects." *Blumenthal* v. *United States,* 332 U.S. 539, 558 (1947).

Prejudice to the defendants may result in any case in which multiple conspiracies are charged as a single scheme. In *United States* v. *Russano,* 257 F.2d 712 (2nd Cir. 1958) the indictment charged a single conspiracy and the proof established two separate conspiracies, and the Second Circuit held the variance to be prejudicial and reversed. In *United States* v. *Buonomo,* 441 F.2d 922 (7th Cir. 1971), where there were two conspiracies with two of the parties as common nuclei and four others, some involved in one of the conspiracies and some in the other, but not all involved in both, the Seventh Circuit found *Kotteakos, supra,* controlling. *Id.* at 926; see also *Rocha* v. *United States,* 288 F.2d 545 (9th Cir.), *cert. den.,* 366 U.S. 948 (1961); *Barnard* v. *United States,* 342 F.2d 309 (9th Cir. 1965).

A procedure was established in the trial court and likewise in the Petition herein and the companion Petition filed by codefendants Paul Pomponio and Peter Pomponio, that a motion or objection made on behalf of one defendant would be considered applicable to the extent relevant to the other defendants and a ruling by the trial court as to any one defendant would be applicable to the other defendants (e.g., Tr. 2504).

The Petitioner suggests to this court that the refusal of the United States Court of Appeals for the Fourth Circuit to address itself to the argument of legally

insufficient evidence with respect to Count IV and awarding Petitioner a new trial subjects the Petitioner to a re-trial in violation of his constitutional rights against double jeopardy and not having answered this question permits the same errors to be made a second time.

The three Pomponio brothers executed a promissory note payable to the order of the Continental Bank in Philadelphia (Government Exhibit 106). This note was guaranteed personally by John McShain (*Ibid.*). A check in the amount of two million dollars payable to the order of Louis J. Pomponio, Jr., Peter and Paul Pomponio was then delivered by the Continental Bank to the defendants (Tr. 293, 1316-1317; Government Exhibit 86). Each of the Pomponio brothers endorsed this check to the order of National Realty and Construction Company (Tr. 384). The check was then delivered to the accountant, H. Burton Bates, who caused it to be deposited to the account of the National Realty and Construction Company, Inc. (Tr. 293-294).

On the books of National Realty, there existed loan accounts for the defendants in various amounts (Tr. 279). A large portion of the two million dollars was shown on the books of National Realty as constituting reimbursement to National Realty from the defendants for the advances which National Realty had earlier made to them (Tr. 295, 409). In short, funds borrowed personally by the defendants were used for the purpose of paying debts which they had personally incurred to their corporation. These reflected "advances" made to them during prior periods.

Separate and apart from the method in which this transaction was handled on the books of National Realty was the evidence of what was done with the

actual dollars which National Realty now found that it had in its account. With those dollars, the evidence reflects, National Realty paid a large variety of obligations which it had incurred to the Internal Revenue Service (Tr. 2210; Def. Ex. 46, 47), suppliers, subcontractors and the like (Tr. 2216; Def. Ex. 52).

From an accounting point of view, it was plain that the infusion of this two million dollars into the business had the consequence of eliminating from the balance sheet of National Realty a large amount of accounts payable as well as a large amount of receivables due from officers, directors or shareholders. Even to an accounting freshman this would constitute the "dressing up" of the statement which had been referred to during the negotiations with McShain (Gov. Ex. 73).

After the Pomponios had encountered financial problems and were unable to make satisfactory payments on the note, on or about February 5, 1973 the Continental Bank instituted suit in the United States District Court for the Eastern District of Pennsylvania. On December 4, 1973 a judgment was entered against Louis J., Peter and Paul Pomponio personally in the amount of $2,186,671 for the principal, unpaid interest and costs (Def. Ex. 44; see generally Tr. 1323); and the claims of the Pomponios against McShain remained to be determined (Tr. 1401-1403).

II. IT IS A DENIAL OF DUE PROCESS BY FAILING TO INSURE A FAIR AND IMPARTIAL TRIAL WHEN THE UNITED STATES COURT OF APPEALS FAILED TO CONSIDER PETITIONER'S ARGUMENT THAT THE PREJUDICIAL REMARKS AND CONDUCT OF THE TRIAL JUDGE DENIED PETITIONER A FAIR AND IMPARTIAL TRIAL WHEN AT THE SAME TIME THE

COURT REVERSED ON OTHER GROUNDS AND REMANDED FOR A NEW TRIAL TO THE SAME TRIAL JUDGE.

The brief filed on appeal to the United States Court of Appeals for the Fourth Circuit presents many documented arguments relating to the prejudicial comments made by the trial judge, the failure of the trial judge to properly instruct the jury and numerous errors relating to the admission of evidence introduced by the Government, exclusion of evidence attempted to be introduced by the Defense, a failure to conduct a proper *voir dire* and a denial of Defense Counsel to cross-examine the Government's witnesses.

Considerable reliance was made by the Government on certain charts introduced into evidence.

It is here, as in the Circuit Court, asserted that the method in which these charts were treated is as follows:

(1) They were placed into the hands of the jurors before their accuracy was tested and established; and

(2) The manner in which they were dealt with and the comments which were made with respect to them by the trial judge imported to them an importance and reliability which his caveats and admonitions (Tr. 895-896, 914-915) could never dispel.

In addition to Defense Counsel exposing that the charts did not in fact refer to the Government Exhibits in accordance with the representations which had been made in that regard concerning them, the cross-examination of the I.R.S. agents testifying about these charts, also indicated that the charts contained numerous errors in substantial amounts and also some rather cavalier adjustments spread over different fiscal years. The deficiencies of the charts and the prejudi-

cial comments of the trial judge are amply demonstrated and shown in the trial transcript at pages 1552 to 1600.

Repeatedly the trial judge reminded the jury that Defense Counsel had relied upon the assistance of two accountants to help design his course of examination (Tr. 952, 958, 968, 1553, 1554, 1559, 1569, 1572, 1579), but never mentioned to the jury that the charts and the Government's audit had taken the combined efforts of as many as thirty highly skilled and carefully trained I.R.S. agents over a period of approximately two years.

It is fundamental that charts should not be admitted unless there is competent and supporting evidence in the record on which to base them. *Lloyd* v. *United States,* 226 F.2d 9, 16-17 (5th Cir. 1955). The charts in this case are based partly on the Pomponio records which were never admitted in evidence and do not in any event plainly support them, and upon agents' work papers which were likewise never admitted into evidence. And thus the 18 charts, which went into the jury room at the conclusion of the trial, became the primary evidence. They were permitted to acquire "an existence of their own, independent of the evidence which gave rise to them." *Holland* v. *United States,* 348 U.S. 121, 128 (1954). And to compound the evil, they were the only pieces of evidence where a separate copy was provided each juror. This procedure is in manifest violation of the rules laid down for the use of charts in criminal cases, and requires reversal of the convictions below. *Holland* v. *United States, supra; Lloyd* v. *United States, supra; Steele* v. *United States,* 222 F.2d 628 (5th Cir. 1955); see also *Baines* v. *United States,* 426 F.2d 833, 839-840 (5th Cir. 1970).

CONCLUSION

This Petition presents constitutional issues of such magnitude that they reach the very heart of the judicial process concerned with criminal prosecutions. If these matters are left unresolved and unfettered, the fundamental Constitutional protections would be denied to the Petitioner.

The refusal of the United States Court of Appeals for the Fourth Circuit to decide the questions raised in the Petitioner's Brief on appeal, not only has subjected the Petitioner to a retrial in violation of the double jeopardy provisions of the Fifth Amendment, but has also subjected the Petitioner to a re-trial wherein the same procedural and prejudicial errors would ecur.

A decision by the United States Court of Appeals for the Fourth Circuit on the issues raised would be dispositive of the fundamental rights accorded to the Petitioner under the Constitution. If the decision of the Court of Appeals is allowed to stand, the Petitioner would be subjected to double jeopardy, and would also be denied due process of law unless the issues raised before the United States Court of Appeals for the Fourth Circuit are decided prior to the commencement of a new trial.

For the foregoing reasons this Court should grant this Petition for a Writ of Certiorari.

LOUIS J. POMPONIO, JR.
1117 North 19th Street
Arlington, Virginia 22209
Pro Se